

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

CANDY WALSH)	
Claimant)	
VS.)	
)	Docket No. 163,502
MOORE'S SUPERMARKET)	
Respondent)	
AND)	
)	
KEMPER INSURANCE COMPANY)	
)	
Insurance Carrier)	

ORDER

ON the 18th day of November, 1993, the application of the claimant for review by the Workers Compensation Appeals Board of the Award entered by Administrative Law Judge Thomas F. Richardson, on October 19, 1993, came regularly on for oral argument by telephone conference.

APPEARANCES

Claimant appeared by and through her attorney, William J. Graybill, of Elkhart, Kansas. The respondent appeared by and through their attorney, Kendall R. Cunningham, of Wichita, Kansas. There were no other appearances.

RECORD

The record as specifically set forth in the Award of the Administrative Law Judge is herein adopted by the Appeals Board.

STIPULATIONS

The stipulations as specifically set forth in the Award of the Administrative Law Judge are herein adopted by the Appeals Board.

ISSUES

- (1) What is the nature and extent of claimant's disability?
- (2) Is claimant entitled to unauthorized medical expense?
- (3) Is claimant entitled to future medical expense?
- (4) Is claimant entitled to vocational rehabilitation?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, and in addition to the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

- (1) The Workers Compensation Appeals Board on review of an act, finding, award, decision, ruling or modification of findings or awards of the Administrative Law Judge shall have the authority to grant or refuse compensation, or to increase or to diminish the award of compensation or to remand any matter to the Administrative Law Judge for further proceedings. 1993 Session Laws of Kansas, Chapter 286, Section

53(b)(1).

(2) The award in this matter was rendered on the 19th day of October, 1993, at which time claimant, Candy Walsh, was awarded a nine percent permanent partial general disability on a functional basis.

(3) This award stemmed from an injury to claimant's low back which occurred on March 1, 1991, while claimant was working in Moore's Supermarket in Elkhart, Kansas. Claimant, a produce manager, injured her back while lifting 50 pound bags of potatoes.

(4) Subsequent to her injury claimant was referred for treatment to a series of physicians, only two of whom were deposed in this matter.

(5) Claimant was provided treatment with Dr. J.E. Harrington, an osteopathic orthopedist beginning May 23, 1991, and continuing through October 8, 1991.

(6) Dr. Harrington diagnosed a right sacroilitis, and with the help of an MRI further diagnosed disc desiccation at the L4-5, L5-S1 and a central bulge of the disc at L4-5 with possible central herniation at L5-S1. Dr. Harrington was unable to elicit any neurological findings other than a slight inability to heel walk and a loss of flexion due to right sacroiliac pain.

(7) During the first examination the claimant was limited in her range of motion but during the June 13, 1991 examination, Dr. Harrington found claimant's range of motion to be normal.

(8) Claimant, described as being obese, was advised by Dr. Harrington on several occasions to lose weight. At the time of the examination claimant weighed 225 pounds. Dr. Harrington recommended conservative care only and did not believe surgery was in order.

(9) Dr. Harrington returned claimant to work initially with a 25 pound maximum weight lifting restriction. This was later reduced to a 15 pound maximum lifting restriction and later modified back to the original 25 pound weight restriction.

(10) Dr. Harrington treated claimant's lumbar spine with epidural steroid injections with no benefit. Dr. Harrington opined that this was an inappropriate response to the epidural injections. The claimant should have experienced at least a temporary benefit if the disc was the cause of the problem. As a result of these injections, Dr. Harrington testified that claimant's condition was not related to the disc problem but, instead, must be originating from some other aggravation.

When asked whether the incident of March 1, 1991, caused or contributed to the claimant's disc problem Dr. Harrington opined that the incident of March 1, 1991, was a temporary incident only with no permanent aggravation of the claimant's condition. He further stated claimant's problems were due to degenerative disc disease which predated her date of accident, exacerbated by her gross exogenous obesity.

Dr. Harrington advised claimant must lose weight as her obesity was the primary cause of her spinal condition. Without weight loss, her ability to reach maximum medical improvement would be greatly delayed.

(11) Dr. Harrington recommended an MMPI be performed on the claimant as her multiple complaints were not supported by objective findings.

(12) Claimant was ordered to Dr. Philip R. Mills, a physical medicine specialist, by the Administrative Law Judge for an IME. He examined claimant on June 29, 1992. Dr. Mills found claimant to be overweight, and further diagnosed lumbar lordosis and foraminal encroachment causing right hip pain. The remainder of claimant's examination was normal.

(13) Dr. Mills recommended work hardening and a pain clinic but advised if this did not improve claimant's condition in two to three weeks, then he had nothing further to offer the claimant.

(14) Dr. Mills rated claimant at seven percent permanent partial disability to the body as a whole as a result of the injury and further modified his rating to between eight and nine percent permanent impairment to the body as a whole if claimant was not given the opportunity to attend the pain clinic and undergo work hardening as he had prescribed.

(15) Dr. Mills admitted that his limitations to the claimant were partially based upon the fact that she was grossly overweight and out of shape. The lumbar lordosis diagnosed by Dr. Mills was a sign of long-term obesity and not the result of the injury of March 1, 1991.

(16) While it is unclear in Dr. Mills's deposition as to the exact cause of all of claimant's complaints he does opine on page 12 of his deposition that, based upon the bulging discopathy, the claimant has a seven percent partial impairment to the body as a whole. Dr. Mills does, although off-handedly, relate the claimant's impairment to the injury of March 1, 1991.

(17) K.S.A. 44-501(a) states in part:

"If in any employment to which the workmen's compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workmen's compensation act. In proceedings under the workmen's compensation act, the burden of proof shall be on the claimant to establish claimant's right to an award of compensation by proving the various condition on which the claimant's right depends."

In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

(18) K.S.A. 44-508(g) defines burden of proof as follows:

"'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true," on the basis of the whole record.

(19) The Appeals Board finds that, based upon the testimony of the claimant and the medical opinion of Dr. Mills claimant did suffer a personal injury by accident on March 1, 1991, arising out of and in the course of her employment with Moore's Supermarket.

(20) Claimant was returned to work at Moore's Supermarket and performed her regular duties as produce

manager with some accommodation being provided.

(21) The claimant's employment at Moore's Supermarket continued until January, 1992, at which time her employment was terminated as the result of an incident which was unrelated to her workers compensation claim.

The store manager, Raymond Knabe, testified that claimant, upon being returned to work, was assigned to her regular duties as produce manager, at comparable wages, with the only accommodation being when claimant was involved in heavy lifting.

(22) K.S.A. 1992 Supp. 44-510e(a) states in part:

"There shall be a presumption that the employee has no work disability if the employee engages in any work for wages comparable to the average gross weekly wage that the employee was earning at the time of the injury."

(23) The Appeals Board finds that based upon a review of the entire record, claimant has failed to show by a preponderance of the credible evidence that the presumption of no work disability contained in K.S.A. 1992 Supp. 44-510e(a) has been overcome. As such claimant is limited to a functional impairment.

(24) K.S.A. 1992 Supp. 44-510e(a) states in part:

"Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence."

Dr. Mills opined claimant's injury resulted in a seven percent functional impairment to the body as a whole as a result of claimant's disc problems. Dr. Mills further expanded this functional impairment to eight to nine percent if claimant did not have the opportunity to undergo work hardening and a pain clinic. As the record is void of any information indicating claimant was offered either the pain clinic or work hardening it is the opinion of this Appeals Board that claimant has suffered a nine percent permanent partial general disability to the body as a whole on a functional basis.

(25) Claimant was examined by Michael Dreiling and Karen Terrill, both vocational rehabilitation specialists, regarding the extent to which the claimant's ability to perform work in the open labor market and to earn comparable wages has been reduced. As the Appeals Board has ruled the claimant is not entitled to a work disability in failing to overcome the presumption of K.S.A. 1992 Supp. 44-510e, further discussion of the opinions of Mr. Dreiling and Miss Terrill are unnecessary.

(26) The Appeals Board finds claimant is entitled to \$350.00 unauthorized medical expense on presentation of proper documentation.

(27) The Appeals Board finds claimant is entitled to future medical treatment upon proper application to and approval by the Director of Workers Compensation.

(28) The claimant is entitled to vocational rehabilitation benefits only upon proper application to and approval by the Director of Workers Compensation.

WHEREFORE, it is the finding, decision and order of the Appeals Board that the Award of Administrative Law Judge Thomas F. Richardson, dated October 19, 1993, should be and is affirmed in all respects and an award of compensation is herein entered in favor of the claimant, Candy Walsh, and against the respondent, Moore's Supermarket, and the insurance carrier, Kemper Insurance Company.

The claimant is entitled to 16.28 weeks of temporary total disability at the rate of \$160.59 per week or \$2,614.41 followed by 398.72 weeks at \$14.45 per week or \$5,761.50 for a nine percent permanent partial general disability making a total award of \$8,375.91. As of October 15, 1993, there would be due and owing to the claimant 16.28 weeks temporary total compensation at \$160.59 per week in the sum of \$2,614.41 plus 120.72 weeks permanent partial compensation at \$14.45 per week in the sum of \$1,744.40 for a total due and owing of \$4,358.81 which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of \$4,017.10 shall be paid at \$14.45 per week for 278 weeks or until further order of the Director.

Claimant is entitled to future medical upon proper application to and approval by the Director of Workers Compensation.

Claimant is entitled to vocational rehabilitation benefits only upon proper application to and approval

by the Director of Workers Compensation.

Claimant is awarded an amount not to exceed \$350.00 as unauthorized medical expenses.

Claimant's contract of employment with her attorney is approved subject to the provisions of K.S.A. 44-536.

Fees and expenses of administration of the Kansas Workers Compensation Act are assessed against the respondent and insurance carrier to be paid direct as follows:

UNDERWOOD & SHANE	
Transcript of Proceedings	\$ 56.20
TRI-STATE REPORTING	
Transcript of Regular Hearing	\$ 212.45
TRI-STATE REPORTING	
Deposition of Mr. Knabe	\$ 205.40
TRI-STATE REPORTING	
Deposition of Dr. Harrington	\$ 298.95
DEPOSITION SERVICES	
Deposition of Dr. Mills	\$ 192.10
DEPOSITION SERVICES	
Deposition of Mr. Dreiling	\$ 225.60
IRELAND COURT REPORTING SERVICE	
Deposition of Karen Terrill	\$ 367.80

IT IS SO ORDERED.

Dated this ____ day of December, 1993.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

cc: William J. Graybill, P.O. Box 898, Elkhart, Kansas 67950
Kendall R. Cunningham, 125 North Market, Wichita, Kansas 67202
Thomas F. Richardson, Administrative Law Judge
George Gomez, Director